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October 4, 1984

Honorable Paul A. Magnuson
United States District Court Judge
708 Federal Courts Building
St. Paul, Minnesota 55101

Re: U.S.A., et al. v. Reilly
Tar & Chemical Corp., et al.
Civil No. 4-80-469

Dear Judge Magnuson:

I guess I have known ever since my years (1954-1955) as law clerk to the Honorable Gunnar A. Nordbye that personal attacks by trial counsel upon one another do not benefit either party to a lawsuit. That is a principle that I have tried to follow since that time. Accordingly, I wish I didn't have to respond to the latest letter from the Minnesota Attorney General's office. We don't have these problems with Wayne Popham or Al Hinderaker.

The ACSH Report

In his footnote on page one, Mr. Shakman says that he views as inappropriate our submission of the recent report on the unreliability of animal studies issued by the American Council on Science and Health. I have often quoted and submitted to the courts portions of learned treatises as matters of which the courts can and should take judicial notice. We are beginning to see, in this country, a scientific revolt against the nonscientific prattle that our environmental agencies have subjected us to over the past decade. When and if this case is tried, we will show that the alleged health risks in St. Louis Park that have received so much publicity over that decade are nonexistent. We will show that the federal-state cancer policy is not based on science, but rather on moral/political

views laced with a good deal of misinformation supplied by state and federal officials. We plan to offer a hard-hitting defense. As the old saying goes, if a person can't stand the heat, perhaps he should leave the kitchen. Our defense will not be directed at Mr. Shakman or Mr. Hird.

The Court has, on two occasions, pointed out to all counsel that it becomes concerned over television programs on the hazards of chemical pollution. We would all be naive if we didn't recognize that judges, like the rest of us, are regularly subjected to the media blitz, presenting views which are spoon fed to the media by agencies like the PCA and the EPA. We would also be naive if we did not recognize that such a blitz may affect the judge's view of a case. Private industry does not have the control over the media that is possessed by environmental agencies. Therefore, I believe it is not inappropriate to give the Court an objective report such as that issued by the ACSH.

Plaintiffs Lack of a Remedial Plan

Also in footnote one, Shakman disputes my statement that the plaintiffs had no remedial plan until Reilly released the ERT report on May 18, 1983. I enclose for your review pages 88-102 from the deposition of Sandra Gardebring, who, at the time of her deposition, was the Executive Director of the PCA. Her testimony fully supports my statement. I am also enclosing a copy of a report entitled, "Terminating an Endless Search," a paper issued by the City of St. Louis Park, one of the plaintiffs in this action. Prior to the ERT report, the State had received a two million dollar grant from the EPA which was for the purpose of study added to the fifty or more consultants reports which had already been done on the St. Louis Park situation. A list of the prior studies is also enclosed. It was only because of my direct, written communications with Shakman that we persuaded the State not to spend the money on more studies - to save it for remedial work.

We have never seen and have never been able to become aware of any concrete remedial plan for the site until the plaintiffs presented one in a settlement conference in January 1984. The same plan was produced in response to Reilly's interrogatories later in 1984. The State/Federal

remedial plan was different from ERT's, but adopted some of its conclusions, and its overall approach.

Expert Reports and Depositions

The stipulated language does set forth the negotiated agreement that expert depositions will start with one plaintiff witness, then alternate between plaintiff and defendant witnesses, as compared with Judge Brotman's order in the Price case which provides for all discovery of plaintiffs' witnesses to proceed first. However, we have no control over which expert the plaintiffs tender as their first one. We know that Warren Thompson, an expert on the subject of waste water treatment (a subject which does not relate to the remedy) has been in the federal stable for the longest time - several years. Our point was and is that the plaintiffs have had over a year to study the ERT report and could clearly focus in on important depositions early in the discovery period. Yet they proposed to us that they give us the reports of their experts on November 30 and start expert witness discovery on December 3. The plaintiffs current alternative of postponing discovery until January 8 will, we submit, unnecessarily postpone discovery and may delay the trial. It has been the plaintiffs who pretend that they are anxious to get to trial on allegations of imminent hazard.

December 15 vs. December 31

The inclusion of the December 15 date was a mistake on my part. Reilly's first proposal was for an exchange of reports on "second tier" witnesses on December 17. I would still like to get those reports (and furnish ours) by the 15th or the 17th. But we did, in meetings in which we were trying to accommodate the plaintiffs' requests for more delay, agree to the 31st.

Dispositive Motions

There is no suggestion in my letter that the plaintiffs suggested to Reilly that it not proceed with discovery because of pending motions. My suggestion was that there are practical limits to what even a large law firm can do, given the peculiar motion practice to which we have been subjected. This case has proceeded in a manner

which I will compare to practice in the days of common law pleadings. It is also comparable to motion practice in New York and New Jersey, where lawyers frequently bring dispositive motions to test the purity of all the legal theories in the pleadings. My experience in Minnesota is that experienced lawyers don't fuss that much with the pleadings. Weak legal defenses have a way of going away by the time the parties get to trial. And legal defenses which may seem weak at first blush sometimes get better when all the facts are in.

Exchange of Ground Water Models

I would not have raised a non-issue if I had known that it was a non-issue. If the plaintiffs had been willing to agree to an October 30 date, why would I bother to write to the Court about it? My very clear understanding was that if we would not change our position on the commencement of discovery, the plaintiffs would not change theirs on the date for the exchange of ground water models. This is indeed the kind of tit for tat negotiating that we get on subjects such as whether we will start an out of town deposition on a Monday or a Tuesday, irrespective of the reasonableness of respective positions. I believe that parties to a negotiation should agree to reasonable requests without keeping score.

I, too, regret this final imposition upon your heavy workload. I will continue to be courteous and fair to Mr. Shakman and Mr. Hird. I know of no reason to do otherwise.

Very truly yours,

Edward J. Schwartzbauer

EJS:ml
Enclosure

cc: All Counsel of Record
Robert Leininger, Esq.
Paul G. Zerby, Esq.